No. 85-732

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; and OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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APPELLANTS' SUPPLEMENTAL BRIEF

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APPELLANTS' SUPPLEMENTAL BRIEF

This brief responds to the Court's November 17, 1986, Order directing the parties to file briefs addressing whether South Dakota's flight property tax, S.D. Codified Laws Ann. ch. 10-29 (1982), could be imposed under 49 U.S.C. § 1513(d)(3) as an "in lieu tax which is wholly utilized for airport and aeronautical purposes" and whether the resolution of that issue is a question of state or of federal law.[1] It is appellants' position that the

[1] Both parties explicitly limited the "question presented" to the meaning of the phrase "subject to a property tax levy" found in

issue is a question of both federal and state law, and that the tax is not an "in lieu tax."

I. WHETHER SOUTH DAKOTA'S FLIGHT PROPERTY TAX IS AN "IN LIEU TAX" WITHIN THE MEANING OF 49 U.S.C. § 1513(d)(3) IS A QUESTION OF BOTH FEDERAL AND STATE LAW.

Although a state court interpretation of the effect of a state's own laws is entitled to great deference, this Court's decisions demonstrate that what constitutes an "in lieu tax" within the meaning of § 1513(d)(3) ultimately is a federal question. In *Chase Manhattan Bank, N.A. v. Finance Administration*, 440 U.S. 447 (1979), for example, the Court reviewed and reversed a determination by the New York Court of Appeals that a rent and occupancy tax was a "tax on tangible personal property" within the meaning of Pub. L. No. 91-156, 83 Stat. 434 (1969). In so doing, the Court specifically described the inquiry to be "a question of federal law." *Id.* at 449. In *City of New York v. Feiring*, 313 U.S. 283, 285 (1941), the Court similarly held that whether a seller's obligation to pay state sales taxes collected from its customers was a "tax" within the meaning of section 64 of the Bankruptcy Act, 52 Stat. 840, 874 (1938) (current version at 11 U.S.C. § 507 (1979 & Supp. 1986)), was a federal question.

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§ 1513(d)(2)(D)'s definition of "commercial and industrial property." Juris. Statement i; Motion to Dismiss or Affirm i. Consideration of the "in lieu" issue appears inconsistent with the Court's usual practice of not reviewing an issue not raised by the jurisdictional statement or fairly included therein unless the state court decision appealed from evinces a plain error which may "seriously affect the fairness, integrity or public reputation of public proceedings." R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE, § 6.26 at 365 (6th ed. 1986), *quoting* United States v. Atkinson, 297 U.S. 157, 160 (1936). *See also* this Court's Rule 15.1(a) and Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590, 597 n.14, *reh'g denied*, 348 U.S. 852 (1954).

A state's characterization of its law may not be used to disguise its substance and thereby defeat a federally conferred immunity from state taxation. *See First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1968).

Nonetheless, in a case involving asserted immunity from state sales taxes the Court has stated:

> When a state court has made its own definitive determination as to the operating incidence [of a tax], our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive.

American Oil Co. v. Neill, 380 U.S. 451, 455-56 (1965); *accord Gurley v. Rhoden*, 421 U.S. 200, 208 (1975). Whether a particular state tax in fact operates as a substitute for other state taxes largely is a state law inquiry. *See United States v. State Bd. of Equalization*, 639 F.2d 458, 462-63 (9th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981).[2] The South Dakota Supreme Court has determined that the State did not adopt its flight property tax "instead of, or, [as] a substitute for" another *ad valorem* property tax. *Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106, 109 (S.D. 1985), *juris. noted, Western Air Lines, Inc. v. Bd. of Equalization*, 106 S.Ct. 1180 (1986). This construction by the State's highest court of the State's own tax law "is consistent with the statute's reasonable interpretation,"

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[2] The court stated, "[t]he teachings of *First Agricultural* and *Chase Manhattan*—that a federal test must be used to determine the incidence and type of a state tax for federal purposes—do not preclude consideration of state law to determine if California's bank franchise tax was imposed in lieu of the sales tax on sales to national banks." *Id.* at 463. *See also* State of Alabama v. King & Boozer, 314 U.S. 1, 9-10 (1941) ("Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority.")

American Oil, *supra* at 455, and thus should remain undisturbed.

II. THE SOUTH DAKOTA FLIGHT PROPERTY TAX IS NOT AN "IN LIEU TAX" UNDER 49 U.S.C. § 1513(d)(3).

Summary: An "in lieu tax" is one that directly substitutes for a tax which would otherwise apply. The existence of an "in lieu" relationship between two taxes is determined from evidence of whether the legislature intended to, and did, effect a *bona fide* substitution of taxes. This is the concept of "in lieu tax" that is incorporated in § 1513(d)(3), as indicated by the overall statutory purpose, the cases dealing with "in lieu" taxes and by evidence showing that Congress specifically intended to protect the Minnesota flight property tax, the only state tax at that time which conformed to the dual test of § 1513(d)(3). In any event there is no basis for finding the South Dakota flight property tax to be an "in lieu tax." The South Dakota flight property tax is not, and never was, a substitute for the general personal property tax or any other tax.

A. An "In Lieu Tax" Must Be A True Substitute For Another Tax.

The cases and literature treat an "in lieu tax" and a tax "in lieu of" another tax synonymously. The words "in lieu of" mean "in place of" or "in substitution of" or "instead of."[3] Where federal statutes refer to taxes "in lieu of" other taxes, they invariably do so in the sense of a substitution of one tax for another.[4]

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[3] BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

[4] For example, 31 U.S.C. § 3124 prohibits taxation of stocks and obligations of the United States Government except for "a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax. . . ." In a technical revision the word "instead" was inserted for "in lieu" for clarity. *See* 31 U.S.C.A. § 3124 (West 1983) (explanatory note). The question of whether a particular Tennessee tax was an "in lieu tax" under the predecessor provision to § 3124 was noted but not decided in Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 396 n.6 (1983).

Section 903 of the Internal Revenue Code, 26 U.S.C. § 903 (1982), extends a foreign tax credit for taxes paid "in lieu of" income and certain profit taxes "generally imposed" by a foreign country. The implementing IRS regulation, Treas. Reg. § 1.903-1(b)(1) (1986), states that a tax may be considered in lieu of an income tax only if it "operates as a tax imposed *in substitution for, and not in addition to*, an income tax . . . otherwise generally imposed." (Emphasis added). The principal inquiry for the courts under § 903 and under its predecessor provision is whether the tax is levied "in place of or instead of or as a substitute for, an existing income or profits tax." *See* Missouri P.R.R. Co. v. United States, 392 F.2d 592, 600-01 (Ct. Cl. 1968); Metropolitan Life Ins. Co. v. United States, 375 F.2d 835, 839 (Ct. Cl. 1967), *citing* United States v. Waterman S.S. Corp., 330 F.2d 128, 131 (5th Cir. 1964), *aff'd on other grounds*, 381 U.S. 252, *reh'g denied*, 382 U.S. 873 (1965).

Prior to December 24, 1969, Congress had allowed state taxation of national banks in four ways if such taxes were "in lieu of" other taxes pursuant to former Rev. Stat. § 5219 (current version at 12 U.S.C. § 548 (1957 & Supp. 1986)), and allowed certain other taxes for a temporary period after that date if the state did not already "impose a tax or an increased rate of tax, in lieu thereof." Pub. L. No. 91-156, § 3(b), 83 Stat. 434, 434 (1969); *see* United States v. State Bd. of Equalization, *supra* at 460-61. The Ninth Circuit described such a state tax as an "in lieu tax." *Id.* at 463.

In the laws of the various states, "in lieu" taxes typically are used as a substitute for *ad valorem* property taxes in instances where it is difficult to arrive at a fair property value by the usual means of valuation. Common examples are gross receipts taxes and severance taxes. Cases interpreting these state statutes make clear that an "in lieu tax" must do more than carry the "in lieu" label; it must truly substitute for another tax. The case most directly in point is *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W.2d 515, 518 (N.D. 1984), upholding a lower court finding that the North Dakota air carrier transportation property tax was not an "in lieu tax" under § 1513(d). The facts there showed that the year after enactment of § 1513(d), the North Dakota

legislature adopted an amendment to the air carrier tax which declared it to be "in lieu of" aircraft registration fees and sales and use taxes.[5] At the same time the legislature adopted amendments purporting to exempt air carriers from registration fees and sales and use taxes.[6] The record, however, showed that the airlines had never been assessed registration fees or sales or use taxes. The trial court opinion clearly explains why these amendments did not create an "in lieu tax" within § 1513(d)(3):

> While Section 57-32-01.1 purports to label the tax in this case as an "in lieu tax," clearly it isn't. There is no other tax that is imposed on airlines. Therefore there is no tax for which this one can be called a substitute or which is instead of another tax.[7]

Similar reasoning was followed in the case below by the South Dakota Supreme Court. It relied upon *Lebeck v. State*, 62 Ariz. 171, 173, 156 P.2d 720, 721 (1945), which refused to enforce a license tax on motor vehicles purportedly imposed "in lieu of all ad valorem property taxes on any vehicle subject to such license tax." The court in *Lebeck* held that, since the plaintiff's vehicles were engaged exclusively in interstate commerce, they were not subject to the *ad valorem* tax in the first place and therefore were not subject to a tax "in lieu of" that tax.[8] *Id.* at 173-74, 156 P.2d at 721.

Federal cases dealing with state "in lieu" taxes also underscore the necessity that the "in lieu tax" function

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[5] N.D. Cent. Code § 57-32-01.1 (1983); 1983 N.D. Laws ch. 592 § 3.

[6] N.D. Cent. Code §§ 57-39.2-04(38) (1983); 57-40.2-04(2) (1983); 2-05-11 (1983).

[7] Northwest Airlines, Inc. v. State Bd. of Equalization, Civ. No. 33697, slip op. at 4 (N.D. Dist. Ct. April 25, 1984), *aff'd*, 358 N.W.2d at 518 (Appendix A).

[8] *Accord* Brush v. State, 59 Ariz. 525, 130 P.2d 506 (1942); *cf.* Lamb v. Milliken, 78 Colo. 564, 567, 243 P. 624, 625 (1926).

as a true substitute. Most such cases deal with challenges under the commerce clause to gross receipts taxes established in lieu of property taxes. In a number of holdings beginning with *Postal Tel. Cable Co. v. Adams*, 155 U.S. 688 (1895), such taxes were sustained if found to be the "just equivalent" of the taxes excused.[9] While the cases in this area of the law do not define the limits of "just equivalent"[10] they do make clear that, to pass constitutional muster, an "in lieu tax" must involve the true substitution of one tax for another rather than the creation of an additional tax. *New Jersey Bell Tel. Co. v.*

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[9] Other cases in this line include: Great N. Ry. Co. v. Minnesota, 278 U.S. 503 (1929); General American Tank Car Corp. v. Day, 270 U.S. 367 (1926); Pullman Co. v. Richardson, 261 U.S. 330 (1923); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); United States Express Co. v. Minnesota, 223 U.S. 335 (1912).

[10] The early cases reflect a concern that the "in lieu" exaction be no greater than the tax for which it substitutes. *See* Pullman Co. v. Richardson, *supra* at 339 (tax "not claimed to be in excess of what would be legitimate as an ordinary tax on the property . . . nor to be relatively higher than the taxes on other kinds of property"); Cudahy Packing Co., *supra* at 456 (tax "not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value"); Postal Tel. Cable Co., *supra* at 697 (tax "amounts to no more than the ordinary tax upon property, or a just equivalent therefor"). However, in the most recent of the "in lieu" cases, Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959), the Court reiterated the requirement that the "in lieu tax" be the just equivalent of a legally applicable tax but declined to explore the limits of "just equivalence." The Court stated, "[w]hile the tax is in lieu of other property taxes which Virginia can legally assess and should be their just equivalent in amount [*citing* Postal Telegraph] we will not inquire into the exactitudes of the formula where appellant has not shown it would be so baseless as to violate due process." *Id.* at 436. Because of the obsolescence of the doctrine which generated these commerce clause cases (*see* Complete Auto Transit v. Brady, 430 U.S. 274 (1977)) there have been no "in lieu" decisions since *Railway Express*. A requirement of "substantial equivalence" with respect to complementary taxes is still very definitely imposed by the Court. *E.g.*, Maryland v. Louisiana, 451 U.S. 725, 759 (1981); *see infra* n.11.

State Bd. of Taxes and Assessments, 280 U.S. 338, 349 (1930) ("we think it very plain that the exaction is not a tax on property nor in substitution for or 'in lieu of' a property tax"). *See also United States Express Co. v. Minnesota, supra* at 346-48; *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 300-01 (1912); *Galveston H. & S.A. Ry. Co. v. Texas*, 210 U.S. 217, 227-28 (1908).

B. Section 1513(d)(3) Does Not Depart From The Concept Of An "In Lieu Tax" As A True Substitute.

Both the legislative history and statutory scheme show that § 1513(d)(3) contemplates the conventional interpretation of an "in lieu tax" as an actual substitute for another tax. Congress was not using "in lieu" to denote a broader concept of taxes—such as "complementary" taxes—which in some way tend to balance each other. While an "in lieu tax" sometimes is regarded as one kind of complementary tax, "in lieu" taxes comprise a narrower class. Judicial review of complementary taxes generally involves constitutional issues and requires courts to look beyond the confines of the tax at issue to determine whether it discriminates.[11] The issue here, however, involves a *statutory* command against discrimination, a distinction the Court emphasized in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979). In interpreting a

[11] *E.g.*, Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1869). In successful complementary taxes the discrimination is cured by enactment of a second tax—generally applicable to a different class of taxpayers—to balance the discrimination inherent in the first. The court's assignment is to determine whether the imposition of different taxes on different classes of taxpayers achieves the necessary equality of result between interstate and local commerce. *E.g.*, Maryland v. Louisiana, *supra*. *See generally* Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986). In the cases involving "in lieu" taxes the courts have not engaged in broad balancing but have looked at the tax on its own terms to determine whether there is a stated or otherwise clear purpose to substitute the tax for another specific tax applicable to the same taxpayer.

statute the Court "look[s] narrowly to the type of tax the federal statute names, rather than . . . consider the entire tax structure of the state. . . ." 441 U.S. at 149-50. This approach is "to be faithful not only to the language of that statute, but also to the expressed intent of Congress in enacting it." *Id.* This same course has been followed in determining whether state taxes discriminate against railroads in violation of 49 U.S.C. § 11503 (Supp. 1986), the railroad version of § 1513(d). *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *Kansas City S. Ry. Co. v. McNamara*, 624 F. Supp. 395, 401 (M.D. La. 1985); *Alabama G. S. Ry. Co. v. Eagerton*, 541 F. Supp. 1084, 1086 (M.D. Ala 1982). As we show below, the South Dakota flight property tax is not an "in lieu tax" under any reading of the term "in lieu" as used in § 1513(d)(3).

1. Section 1513(d)(3) was intended to protect the Minnesota flight property tax, which is a true substitute tax.

The record below provides evidence of what Congress meant by an "in lieu tax." In the airlines' Reply Brief to the trial court in this case, they referred to and attached an affidavit prepared for a related case by John L. Zorack, an attorney who was involved in the passage of what is now § 1513(d). Mr. Zorack's affidavit (Appendix B) states that § 1513(d)(3):

> was not contained in early drafts of either the Senate or House versions of section [1513(d)] but was inserted at the conference stage . . . to take care of Minnesota's objection to an earlier version. Senator Durenberger and the State of Minnesota submitted the final draft as approved by the conference committee and was needed so that section [1513(d)] would not invalidate the Minnesota airflight property tax, Minn. Ann. Stat. § 270.071-079, which is a true in lieu tax imposed with the consent of the relevant airlines instead of other taxes which would otherwise be levied on airflight property. The lan-

guage was drafted primarily by officials in the Department of Revenue, State of Minnesota, and was agreed to unanimously by the House-Senate Conference Committee.

Other than the Zorack affidavit, nothing appears in the record of this case or the formal legislative history expressly addressing the meaning of "in lieu tax" in § 1513(d)(3). There is, however, no reason to doubt the accuracy of the Zorack affidavit, and its plausibility is confirmed by the research into state "in lieu" taxes in effect at the time of enactment of § 1513(d). This research indicates that the Minnesota statute was the only state law meeting the terms of § 1513(d)(3) when it was enacted in 1982.[12]

The Minnesota flight property tax is plainly an "in lieu tax." It carried out a 1944 amendment to the State's constitution permitting aircraft to be taxed "on a more onerous basis than other personal property . . . in lieu of all other taxes."[13] Prior to adoption of the flight

[12] Several other states had special taxes on airline property which were arguably in lieu of other taxes. *E.g.*, Ariz. Rev. Stat. Ann. § 42-705(b) (West Supp. 1986); Ga. Code Ann. §§ 48-5-541 to 48-5-546 (1982); Miss. Code Ann. §§ 27-35-701 to 27-35-711 (1972); Neb. Rev. Stat. §§ 77-1245 to 77-1250 (1976 & Cum. Supp. 1984); S.C. Code Ann. §§ 12-37-2410 to 12-37-2470 (Law. Co-op. Supp. 1985); Wis. Stat. Ann. §§ 76.01, 76.03, 76.23 (West 1975). There is currently some earmarking of funds in Arizona (beginning in 1986, Ariz. Rev. Stat. Ann. § 42-705(b) (West Supp. 1986)) and Wisconsin (a "transportation fund" covering air and surface transportation, Wis. Stat. Ann. § 25.40(2) (West 1975)). However, none of the above statutes direct that the funds collected from the tax be utilized specifically for airport or aeronautical purposes.

[13] Minn. Const. of 1857, § 4 (1944). As later modified, this portion of Minnesota's constitution now provides:

> The legislature may tax aircraft using the air space overlying the state on a more onerous basis than other personal property. Any such tax on aircraft shall be *in lieu of* all other taxes.

Minn. Restructured Const., Art. X, Sec. 5 (emphasis added).

property tax in 1945, all airline property was subject to general personal property taxes applicable to domiciliary corporations, *cf. Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, *reh'g denied*, 323 U.S. 809 (1944), and those general taxes remained applicable to all real and personal property of airlines "except flight property." Minn. Stat. Ann. § 270.072 (West 1969). Under the flight property tax, aircraft are taxed differently and all proceeds of that tax are placed in a fund for airport and aeronautical purposes under Minn. Stat. Ann. § 270.077 (West 1969). In accordance with the State constitution's "in lieu" requirement, other potentially applicable taxes contain specific exclusions for these aircraft.[14]

If, as indicated, § 1513(d)(3) was intended to protect the Minnesota flight property tax, then other taxes claimed to fall within the "in lieu tax" language of § 1513(d)(3) should reflect a similarly clear legislative intent to be substituted for other taxes. As discussed below, no such legislative intent can be found with respect to the South Dakota flight property tax.

2. *An interpretation of "in lieu tax" as other than a true substitute would not be consistent with the statutory purpose.*

The clear purpose of § 1513(d) is to prohibit tax discrimination against airline property in relation to other business property. Section 1513(d)(3) creates an exception to the prohibition of § 1513(d), but not to its basic purpose. The exception allows for a discriminatory property tax if the impact of such discrimination is mitigated by excusing the airline from other taxes, and such discriminatory taxes are wholly utilized for airport and aeronautical purposes. Obviously, that statutory purpose is not served if an "in lieu tax" can be read to mean a

[14] Aircraft registration taxes, Minn. Stat. Ann. § 360.521 (West 1969 & Cum. Supp. 1987); sales and use taxes, Minn. Stat. Ann. § 297A.25(m) (West 1969).

tax which does not *in fact* substitute for taxes which the airline would otherwise have to pay.[15]

A discriminatory property tax which purported to be "in lieu of" an inapplicable tax—such as gross receipts taxes prohibited by § 1513(a) or a tax which unconstitutionally discriminates against interstate commerce—plainly would not be an "in lieu tax" consistent with the overall scheme of § 1513(d). Neither can it be contended that the term "in lieu tax" should be loosely construed because the true purpose of § 1513(d)(3) is to encourage states to use receipts from airline taxes to build their own airports. Such a notion is not supported by the legislative history of § 1513(d)(3),[16] and contravenes Congress' overarching policy of preempting state taxation to support airport development in favor of federal taxation

[15] The statute does not answer—and this case need not answer—the question whether the "in lieu tax" must be no greater than the tax it replaces. As noted, the Court has spoken of a "just equivalent" test where the question was whether the "in lieu tax" satisfied a claim of unconstitutional discrimination. *See supra* n.10. Similarly, the Court's complementary tax decisions are bottomed on principles of equal treatment. *See supra* n.11. The purpose of § 1513(d), by forbidding discriminatory classifications, is to achieve *less* discrimination than the Constitution permits. *Cf.* Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940). In view of this stricter anti-discriminatory purpose, there would appear to be a requirement of "equivalence" with respect to "in lieu" taxes under § 1513(d)(3).

[16] Section 1513(d) was first proposed by airlines which were seeking the same relief from discriminatory property taxes as railroads and motor carriers. The legislation, however, did not follow the usual course of separate committee consideration and enactment in each house. Instead, it surfaced in the conference report on the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324. *See* H.R. Rep. No. 760, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 1190. Such a process does not suggest, or leave much room for, the kind of policy analysis that would underlie the adoption of the "in lieu tax" exception to encourage state financing of airports unrelated to federal development criteria.

to support a federal trust fund for this purpose.[17] In any case, such a view would be at odds with the thrust of the Zorack affidavit and the terms of other state tax statutes at the time. These strongly support the view that the reference in § 1513(d)(3) to the use of funds for airport and aeronautical purposes was included in order to confine the "in lieu tax" exception to the one state—Minnesota—whose Senator stood in the way of enactment.

C. The South Dakota Flight Property Tax Is Not An "In Lieu Tax" Which Substitutes For Personal Property Taxes.

In the courts below the State took the position that the flight property tax was a tax "in lieu of" the South Dakota personal property tax. This view was upheld in the trial court but rejected by the South Dakota Supreme Court on the grounds that the tax is "not a substitute for an *ad valorem* personal property tax." 372 N.W.2d at 109. To the extent that the South Dakota court was construing the State's own statutes and concluding that the South Dakota legislature did not intend the flight property tax to replace other property taxes, *American Oil*, *supra* at 455-56, and similar decisions make that holding "conclusive."

[17] Congress' basic goal in federal airport legislation has been to create *federally* established tests of need, financed by *federal* ticket and excise taxes. As the Court noted in Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 9 (1983), the prohibition on state taxes in § 1513(a) was adopted because "[b]oth Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." Similar reasoning was applicable in 1982 when Congress in the same bill that adopted § 1513(d) reauthorized the federal airport program. Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Title V, 96 Stat. 671. Nor is there any reason that the airlines would have wanted to direct state tax receipts to airport purposes. Airlines have traditionally been concerned about encouraging ambitious airport programs based on civic pride rather than need because they typically pay for oversized airports with oversized landing fees.

Even if this holding is not accepted as conclusive, the South Dakota Supreme Court's key factual finding should be accorded great deference. The South Dakota court found that the 1961 flight property tax was "the first imposition of personal property tax on the airline flight property." 372 N.W.2d at 109. In other words, even though the State had previously (since 1901) had a personal property tax, it had not imposed it or any similar tax upon the aircraft of interstate or international airlines.[18] Thus it is clear that at the time of its enactment the flight property tax was not intended as a substitute for other personal property taxes. In any case the general personal property taxes that the State alleges would otherwise have applied were repealed in 1978. S.D. Codified Laws Ann. § 10-4-6.1 (1982); 1978 S.D. Laws ch. 72 §§ 2, 9.

The State's argument must therefore be that the flight property tax somehow became an "in lieu tax" after 1961 and continued as an "in lieu tax" after 1978. Even if logically plausible, such a conclusion would require some credible showing that the South Dakota legislature intended the tax to be a substitute for a tax that otherwise would have applied. The use of the term "in lieu," while by no means decisive, would have been one such indication of intent, especially since it has been used in a number of other statutes.[19] Such evidence is conspicuously

[18] The State clearly had the power to tax domiciled airlines under Northwest Airlines, Inc. v. Minnesota, *supra*, and, after the decision in Braniff Airways, Inc., *supra*, the power to levy a fairly apportioned tax on the flight property of nondomiciled airlines.

[19] Taxes on the following industries in South Dakota are expressly stated to be "in lieu of" property taxes: express companies (S.D. Codified Laws Ann. § 10-32-2 (1982) (adopted 1925)); telephone companies (S.D. Codified Laws Ann. § 10-33-26 (1982) (adopted 1955)); rural electric companies (S.D. Codified Laws Ann. § 10-36-11 (1982) (adopted 1941)); telegraph companies (S.D. Codified Laws Ann. § 10-34-15 (1982) (adopted 1917; "in lieu of all other taxes")). An original one-time registration tax on non-carrier aircraft is also expressly stated to be "in lieu of" certain other taxes. S.D. Codified Laws Ann. § 50-11-19 (1983 & Supp. 1986) (adopted 1939). References to "in lieu" also appear in the personal property tax itself. S.D. Codified Laws Ann. § 10-6-2.2 (1982) provides that certain exemptions from the tax for household effects and the like "shall not impair or repeal any tax or fee authorized to be levied or imposed *in lieu of* personal property tax." (Emphasis added).

absent, as is all other evidence of intent to accomplish a true substitution for another tax. As for the future, whatever taxes the State might choose to adopt are not relevant here; the essence of the "in lieu" concept is a substitution for an *existing* tax, not an exemption from unspecified future enactments.[20]

D. The South Dakota Flight Property Tax Is Not An "In Lieu Tax" Which Substitutes For Aircraft Registration Taxes. In Any Case The Court Should Decline Jurisdiction Of Any Claim That The Flight Property Tax Substitutes For Registration Taxes.

1. *Jurisdiction should not be accepted.*

In the courts below, the State's only "in lieu" argument was that the flight property tax was imposed in lieu of other personal property taxes. Appellees' Brief to the South Dakota Supreme Court at 13-16, and to the Circuit Court at 11-13. That was the only "in lieu tax" issue

[20] In the lower courts the State cited the language of S.D. Codified Laws Ann. § 10-4-6.1 (1982) which, beginning in 1978, exempted non-centrally assessed personal property from *ad valorem* taxation except that "[t]his exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax." *See* 1978 S.D. Laws ch. 72 §§ 2, 9. That language, however, does not represent, as the State alleged, a determination that the flight property tax is or had been an "in lieu tax." That tax continued in effect by virtue of the previous sentence in § 10-4-6.1, which stated: "Personal property as defined in § 10-4-6 *which is not centrally assessed* is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation." (Emphasis added).

considered and decided by the Circuit Court and the South Dakota Supreme Court.

At oral argument, however, the Attorney General alluded to aircraft registration taxes and implied for the first time that the flight property tax was in lieu of such taxes. There has been no consideration of that contention by the lower courts and, under well established precedent, a construction of state law allegedly in conflict with federal law may not be raised in this Court unless it first was, "set up or claimed in such a way as to bring the subject to the attention of the state court." *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899). The state court must be given an "opportunity authoritatively to construe" the state statute whose validity is being challenged. *Wilson v. Cook*, 327 U.S. 474, 480 (1946). Failure to raise an issue in the state court is a jurisdictional defect precluding consideration of that issue by this Court. *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382-83 n.6 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

2. *In any case the flight property tax is not in lieu of aircraft registration taxes.*

South Dakota's aircraft registration taxes consist of an annual registration fee of between $15 and $100 per aircraft, S.D. Codified Laws Ann. § 50-11-12 (1983 & Supp. 1986), which is "in lieu of all personal property taxes, general or local, on aircraft authorized by any law or ordinance of this state or any of its political subdivisions . . . ." S.D. Codified Laws Ann. § 50-11-18 (1983). In addition, there is an original registration tax of 4% of the purchase price of any aircraft kept in the State for more than 90 days. S.D. Codified Laws Ann. § 50-11-19 (1983 & Supp. 1986). The latter tax is paid one time regardless of subsequent sale or transfer, and is "in lieu of all occupational, sales, excise, privilege and franchise taxes levied by this state upon the gross receipts from all sales of aircraft." *Id.* Neither tax applies to

any aircraft "which is engaged in regularly scheduled flying constituting an act of interstate or foreign commerce." S.D. Codified Laws Ann. § 50-11-28 (1983).

The South Dakota flight property tax cannot be considered as "in lieu of" these registration fees. The registration fees were enacted in 1949 and have never been applicable to interstate airlines, either before or since the adoption in 1961 of the flight property tax. Absent the element of substitution, there cannot be an "in lieu tax."

In any case the 4% original registration fee and the annual fee of up to $100 per aircraft are themselves "in lieu" taxes. By exempting airlines from the 4% tax the statute makes applicable to airlines any tax that might otherwise apply, such as the 4% general sales and use taxes adopted in 1935 and 1939, respectively. S.D. Codified Laws Ann. ch. 10-45 and 10-46 (1982 & Supp. 1986).[21] The exemption from the annual registration fee simply means that airlines subject to the flight property tax cannot avoid it by paying an annual registration tax.

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[21] From their inception both taxes excepted the sales and use of property which the State is prohibited from taxing "under the Constitution or laws of the United States." S.D. Codified Laws Ann. §§ 10-45-9; 10-46-7 (1982). Even if these exceptions for some reason are construed as prohibiting *any* sales or use taxes on aircraft engaged in interstate commerce, it is clear from the date of their adoption that they were not adopted as part of legislation intended to substitute the flight property tax for sales and use taxes. Moreover, if the sales and use taxes did not apply, the flight property tax would not be an "in lieu tax" because it would not be a substitute for an otherwise applicable tax.

CONCLUSION

The question of whether a state tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes" is one of both federal and state law. The South Dakota flight property tax is not such an "in lieu tax."

Respectfully submitted,

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December 8, 1986

APPENDICES

APPENDIX A

STATE OF NORTH DAKOTA
IN DISTRICT COURT
COUNTY OF BURLEIGH
SOUTH CENTRAL JUDICIAL DISTRICT

Civil No. 33697

NORTHWEST AIRLINES, INC.,
REPUBLIC AIRLINES, INC.,
FRONTIER AIRLINES, INC.,
Plaintiffs,

vs.

STATE OF NORTH DAKOTA by and through the STATE BOARD OF EQUALIZATION, the STATE TREASURER OF NORTH DAKOTA and the STATE TAX COMMISSIONER OF NORTH DAKOTA,
Defendants.

MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT

This action is before the court on cross motions for summary judgment.

There are no disputed facts. There are disputes dealing with the application of the law to the facts and the conclusions of law to be drawn.

This case concerns the 1982 property tax assessments levied by the State Board of Equalization against the plaintiffs in 1983 under Chapters 57-32 and 57-06, amounting to $320,142.15.

I.

The procedural defense of the State is without merit.

Section 57-32-03 requires the state tax commissioner to file a certified list of the taxes imposed upon the plaintiffs, such filing to be with the state treasurer on or before March 31st. Such taxes are then due on the 15th of April next following the certification.

In this case the certification for the 1982 taxes occurred, not in March 1983, but April 22, 1983. Therefore the taxes were not due until April 15, 1984.

II.

The plaintiffs' argument that the assessment is prohibited by 49 U.S.C. section 1513(d)(1) is without merit.

Within the federalism concept of this republic is the inherent, fundamental principle that this state has plenary power. This sovereign state has all the necessary power and authority to accomplish its goals by legislation. The state constitution is a limitation of that power. The Federal Constitution, however, is a grant of power. Congress, in enacting any federal statute, must find in the Federal Constitution a grant of such power for such statute.

The assessment of airline property in this state is based and found in the North Dakota Constitution, article X, section 4, and then explained and defined by legislation.

Having plenary power, the State has the widest discretion in classifying property, subject only to the standard of uniformity as required in article X, section 5, which is substantially the same as the fourteenth amendment. *Souris River Telephone Mutual Aid Corp. v. State*, 162 N.W.2d 685 (1968).

Congressional encroachment into or limitation of state taxation can only be done if the congressional enactment is grounded in the Federal Constitution. Section 1513(d) attempts to ground itself in the interstate commerce clause. By doing so, both the state constitution requirement of this tax and the interstate commerce clause of the Federal Constitution must "live" in some form of harmony, together with the enactments by the legislative bodies of the two governments.

Only when Congress, acting under a specific or implied grant of authority from the states as found in the Federal Constitution, expresses its purpose clearly can it be said to have changed the state-federal balance. Tribe, *American Constitutional Law*, sections 5-8, p. 242-243 (1978). In other words, Congress must make a clear statement that it has chosen to control a specific subject matter or has pre-empted that subject matter under specific federal constitutional authority, particularly taxing power of the state. Such an enactment arises only from a grant of power to the Congress by the states, such as the commerce clause. This case and the federal enactment do not contain such a "clear statement" and is therefore distinguishable from the railroad statutes involved in *Ogilvie v. N.D. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), cert. den., 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981) and *Trailer Train Co. v. N.D. State Board of Equalization*, 710 F.2d 468 (8th Cir. 1983).

This court concludes that it cannot be said that section 1513(d) clearly regulates the State or pre-empts the State's power as to how or if it may impose its tax. The State's plenary power of classification for taxation is governed by the fourteenth amendment. The federal statute here requires no more than is already required: that a state reasonably classify airline property within the parameters of the fourteenth amendment. The assess-

ment of ten percent of true market value is the same for all classified property as defined in Chapter 57-32.

This court concludes that article X, section 4 and Chapters 57-32 and 57-06 are not in conflict with 49 U.S.C. section 1513(d) but are in harmony with the federal enactment.

The court further concludes that the imposition, assessment and collection of this tax is not prohibited by the federal enactment or the interstate commerce clause.

III.

The State's argument that this is an "in lieu" tax is without merit.

The State appears to assert that since the plaintiffs pay no other taxes, this tax is in lieu of such other taxes and therefore fits within the exception of 49 U.S.C. section 1513(d)(3).

"In lieu of" means "instead of."

While Section 57-32-01.1 purports to label the tax in this case as an "in lieu tax," clearly it isn't. There is no other tax that is imposed on airlines. Therefore there is no tax for which this one can be called a substitute or which is instead of another tax. Article X, section 4, specifically requires the assessment of the tax in this case and the manner in which the assessment was made. The legislature does not have the authority to rename this tax. Whatever name the legislature chooses to utilize concerning this tax, its very definition and nature is found in the constitution itself, not in the enacting legislation.

IV.

As a collateral matter, the State has filed a motion to strike three affidavits filed by the plaintiffs in support of the plaintiffs' motion for summary judgment. That motion is granted.

The court grants and orders summary judgment to be entered in behalf of the defendant State of North Dakota.

Dated this 25th day of April, 1984.

BY THE COURT:

/s/ Dennis A. Schneider
DENNIS A. SCHNEIDER
District Judge

APPENDIX B

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH
IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Civil No. ——

NORTHWEST AIRLINES, INC.,
REPUBLIC AIRLINES, INC.,
FRONTIER AIRLINES, INC.,
Plaintiffs

vs.

STATE OF NORTH DAKOTA by and through the STATE BOARD OF EQUALIZATION, the STATE TREASURER OF NORTH DAKOTA and the STATE TAX COMMISSIONER OF NORTH DAKOTA,
Defendants.

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Affidavit of John L. Zorack

I John L. Zorack, being duly sworn, depose and say as follows:

1. I am an attorney, a partner in the Washington, D.C. law firm of Cook, Purcell, Henderson and Zorack. In this capacity I represent clients in a variety of legislative matters before the United States Congress.

2. During the spring and summer of 1982 I was closely involved in the passage of the amendments to section 1113(b) of the Federal Aviation Act of 1958 (49 U.S.C. § 1513(b)), which ultimately became law as part

of the Tax Equity and Fiscal Responsibility Act ("TEFRA" or "the Act"). TEFRA became effective on September 3, 1982. In particular I was involved in the inclusion of section 532 of the Act, which amended the Federal Aviation Act so as to prohibit a State from assessing or taxing air carrier transportation property at a rate higher than that applied to other comparable commercial and industrial property.

3. The clear purpose of section 532 was to avoid an unreasonable burden on interstate commerce through the imposition of state taxes which discriminate against airlines. The legislation placed the airlines in this respect on the same footing as the nation's railroads and trucking companies—the Railroad Revitalization and Regulatory Reform Act of 1976 and the Motor Carrier Act of 1980 prohibit the States from assessing railroad and trucking property respectively at a rate higher than that prevailing for commercial and industrial property.

4. Section 532 contains a provision stating that the prohibition will not apply "to any in lieu tax which is wholly utilized for airport and aeronautical purposes." This "in lieu" provision was intended to ensure that the Act would not invalidate state taxes which are a legitimate substitute for other taxes on air carrier transportation property and which are not imposed in an effort to tax such property at rates higher than those imposed on other comparable commercial and industrial property. The provision was not contained in early drafts of either the Senate or House versions of section 532 but was inserted at the conference stage. The in lieu provision was inserted to take care of Minnesota's objection to an earlier version. Senator Durenberger and the State of Minnesota submitted the final draft as approved by the conference committee and was needed so that section 532 would not invalidate the Minnesota airflight property tax, Minn. Ann. Stat. § 270.071-079, which is a true in lieu tax imposed with the consent of the relevant airlines

instead of other taxes which would otherwise be levied on airflight property. The language was drafted primarily by officials in the Department of Revenue, State of Minnesota, and was agreed to unanimously by the House-Senate Conference Committee.

5. To my knowledge no other state made any representation at the time that it wished to be protected by the in lieu provision.

/s/ John L. Zorack
JOHN L. ZORACK

Subscribed and sworn to before me this 9th day of November 1983.

/s/ [Illegible]
Notary Public

My Commission Expires:
May 14, 1987